Supreme Court, U.S.
FILED
APR 22 1992
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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF ON THE MERITS BY PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a stay or supersedeas bond is necessary to preserve appellate jurisdiction in a civil forfeiture case?

PARTIES TO THE PROCEEDING

Petitioner: Republic National Bank of Miami, a national banking association.*

Respondent: United States of America

*Other parties below:***

Thule Holding Company

Indalecio Iglesias

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* Pursuant to Sup. Ct. R. 29.1, Republic is a wholly owned subsidiary of Republic Banking Corporation of Florida, a Florida corporation. There are no non-wholly owned subsidiaries of Republic.

** As this is a civil forfeiture action, the property, One Single Family Residence Located at 6960 Miraflores Avenue, was the "defendant" in the courts below.

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REFERENCE TO OPINIONS BELOW

The opinion of the court of appeals is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), and is reproduced in the Joint Appendix at pages JA 29-37. The memorandum opinion of the district court is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 731 F.Supp. 1563 (S.D. Fla. 1990), and is reproduced in the Joint Appendix at pages JA 5-24.

JURISDICTION

This Court's jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. § 1254(1). The judgment appealed from was rendered by the Eleventh Circuit Court of Appeals on June 10, 1991. (JA 29). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated August 7, 1991. (JA 38-39). This Court granted the petition for writ of certiorari by order dated February 24, 1992.

RULES AND STATUTES INVOLVED

This Petition involves Rule 3(a) of the Federal Rules of Appellate Procedure, which provides:

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

STATEMENT OF THE CASE

The Government filed this action under 21 U.S.C. § 881(a)(6), seeking civil forfeiture of a single family home located in Miami, Dade County, Florida. (JA 26). Petitioner Republic held a mortgage which encumbered the home and filed its Answer and Verified Claim as mortgagee. (JA 6). By Stipulation and Court Order, the real property was sold during the pendency of the case for approximately $1 million, which was turned over to the United States Marshal for the Southern District of Florida as a substitute for the real property. (JA 6).

After a trial on the merits, the district court entered judgment denying Republic's mortgage claim and forfeiting the property. (JA 25-28). Republic timely filed its notice of appeal but did not post a bond to supersede the district court's judgment. (JA 31). Thereafter, at the *ex parte* request of the Government, the United States Marshal transferred the cash proceeds to the Asset Forfeiture Account of the United States Treasury. *(Id.)* The Government then moved to dismiss the appeal, which motion was granted by a panel of the Eleventh Circuit. (JA 40-41). Republic unsuccessfully petitioned for rehearing and suggestion for rehearing *en banc*. (JA 38-39).

In its Opinion, the Eleventh Circuit held that once the Government transferred the cash proceeds of the sale to the Asset Forfeiture Account purportedly outside of the Southern District of Florida, both the district court and the appellate court were divested of jurisdiction. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue,* 932 F.2d 1432, 1435-36 (11th Cir. 1991). (JA 33-34). The court ruled that *United States v. One Lear Jet Aircraft,* 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied,* 487 U.S. 1204 (1988), "controls the result in this case." 932 F.2d at 1435. (JA 33). In *One Lear Jet,* the Eleventh Circuit, in a sharply divided 6-5 decision, ruled that "because removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction, this Court does not have jurisdiction to hear [the claimant's] appeal." 836 F.2d at 1573 (citations omitted). In the decision below, the Panel rejected all of Republic's contentions, including that the court continued to have *in personam* jurisdiction even after the *res* was removed by the Government. 932 F.2d at 1436-37. (JA 34-35).

SUMMARY OF ARGUMENT

In civil forfeiture actions, money seized at the inception of the action is usually deposited in the court registry or the Justice Department's Seized Assets Deposit Fund pending the outcome of the case. The Government contends, and the Eleventh Circuit agreed below, that if the Government prevails at trial, it can "transfer" the money to its Asset Forfeiture Account in Washing-

ton, D.C. and thereby divest the appellate court of jurisdiction to hear an appeal, unless the losing party posts a supersedeas bond to stay the final judgment.

The Government's post-judgment "transfer" of seized funds does not and should not divest the appellate court of jurisdiction for several reasons.

First, the Government's contention conflicts with the federal appellate rules. The only requirement for appellate jurisdiction is the timely filing of a notice of appeal. Neither a bond nor stay of the final judgment pending appeal is necessary to appellate jurisdiction.

Second, the Government's contention is based in part on the "ship personification" admiralty fiction, but the analogy is inappropriate. Even in admiralty actions, continuous physical possession of the *res* by the court, after initial seizure, has never been an immutable rule of jurisdiction. Moreover, the "ship personification" fiction was created to broaden jurisdiction and the availability of remedies. The fiction should not be used as a weapon to defeat jurisdiction.

Third, while civil forfeiture cases are labelled proceedings *in rem*, by bringing the case and seeking affirmative relief, the Government, as plaintiff, submits itself to the *in personam* jurisdiction of the court. Just as a party cannot defeat appellate jurisdiction by leaving the district after the trial, removal of the *res* in a civil forfeiture case by the successful plaintiff should not defeat appellate jurisdiction. The Government's reliance on what it asserts are unique rules of *in rem* jurisdiction is misplaced. Several decisions of this Court have mandated that the same rules apply equally to both *in rem* and *in personam* actions.

Fourth, the Government's contention is particularly inappropriate in currency forfeiture cases. Because money is fungible, it is specious to argue that the seized funds are "transferred" from the jurisdiction when all that occurs is a bookkeeping entry showing a debit to one government account and a credit to another government account.

Fifth, in civil forfeiture cases brought under 21 U.S.C. § 881, the location of the property is no longer the sole basis on which a court may base jurisdiction. Whenever, as in this case, the owner of the property is found in the district, or the owner is indicted in the district for a violation that is also the basis for the forfeiture, jurisdiction attaches without regard to the location of the property.

Sixth, the Government's contention that a stay is necessary to appellate jurisdiction leads to unfair results. Ordinarily, a court requires a supersedeas bond before entering a stay. If a stay is necessary, claimants who cannot afford to post a bond will be denied the right to appeal. The Government's contention also requires a claimant to obtain a stay within ten days of entry of judgment, failing which the Government can remove the property and defeat appellate jurisdiction. Litigants will no longer have the thirty days specified in the appellate rules to decide whether to take an appeal, but rather will have to act immediately on entry of judgment. This will, in turn, lead to a flood of emergency stay motions, imposing additional burdens on already overcrowded federal courts.

Seventh, the Government's contention is fundamentally unjust. The purpose of a supersedeas bond and stay pending appeal is to protect the interests of the prevailing party by assuring collection of a judgment. In a civil forfeiture case, after judgment, the Government controls the property; consequently, the Government does not need further protection. To require a stay and supersedeas bond under these circumstances does not further any remedial purpose, but only provides a weapon to defeat appellate rights.

ARGUMENT

For the reasons which follow, this Court should vacate the Eleventh Circuit's judgment dismissing Republic's appeal and order that the appeal be reinstated.

A. *The Government's Contention is Contrary to the Rules of Appellate Jurisdiction.*

Under the Federal Rules of Appellate Procedure, a stay of a judgment is unnecessary to appellate jurisdiction. Fed.R.App.P. 3(a) provides that an appellate court has jurisdiction of an appeal as soon as a notice of appeal is filed in the district court. While the filing of the notice of appeal is "mandatory and jurisdictional," *United States v. Robinson,* 361 U.S. 220, 224 (1960), the "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal ...." Fed.R.App.P. 3(a). Generally, the only consequence of failing to obtain a stay of a final judgment pending appeal is that the prevailing party may execute on the judgment ten days after its entry. Fed.R.Civ.P. 62(a). Even if the prevailing party, on execution, removes the property while the case is on appeal, the appeal goes forward. *County of Dakota v. Glidden,* 113 U.S. 222, 224 (1885).

B. *The Government's Contention is Based on a Fundamentally Flawed and Inapplicable Analogy to Admiralty Law.*

Although the appellate rules do not require a stay or a bond to appeal, the Government contends that a bond and a stay are required in civil forfeiture cases. The Government bases its contention on an analogy to the ancient fiction of the "personification" of a ship originating in admiralty cases.

"Libels in admiralty may be *in rem* or *in personam.* It is customary to say that the action *in rem* is brought against the vessel while the action *in personam* is against the owner." *G. Gilmore and C. Black, The Law of Admiralty,* 2d Ed. (1975) at 613. In an *in rem* libel, instead of suing the human wrongdoer, the plaintiff sued the ship itself as "the offending thing." *Id.* at 589. *In rem* admiralty jurisdiction vests upon "seizure of the res and the publication of the monition or invitation to appear ...." *Taylor v. Carryl,* 61 U.S. (20 How.) 583, 599 (1858).

Some lower court admiralty cases have held that if the ship leaves the jurisdiction during the case, the court no longer has jurisdiction to proceed. *E.g., L.B. Harvey Marine, Inc. v. M/V "River Arc",* 712 F.2d 458, 459 (11th Cir. 1983), *Taylor v. Tracor Marine, Inc.,* 683 F.2d 1361, 1362 (11th Cir. 1982), *cert.*

denied, 460 U.S. 1012 (1983). The Government relies on these cases, by analogy, in moving to dismiss appeals from civil forfeiture judgments after the Government has removed the *res* from the jurisdiction. *See United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988) (citing *Harvey* and *Taylor*, *supra*).

The Government's argument by analogy is flawed for several reasons. First, continuous physical possession of the *res* has never been an immutable rule of jurisdiction. Over one hundred years ago, this Court rejected the premise, implicit in the Government's argument, that continuous presence of the *res* is jurisdictionally required in *in rem* cases. In *The Rio Grande v. Otis*, 90 U.S. (23 Wall.) 458 (1875), an admiralty case, this Court held that where the ship was improperly released by the marshall, the court's jurisdiction was not divested, since "actual and continuous possession of the res" is not required to sustain jurisdiction. *Id.* at 463. This Court explained that "[w]hen the vessel was seized by the order of the court and brought within its control, the *jurisdiction was complete*." *Id.* (emphasis added). If, as the Government argues, jurisdiction depended on continuous physical possession of the *res* after seizure, a removal of the *res* for any reason, proper or improper, would destroy jurisdiction. The Government's argument, therefore, cannot be squared with the result or rationale of *The Rio Grande*.[1]

---

[1] The holding in *The Rio Grande* that "jurisdiction was complete" as soon as the *res* was seized is also consistent with the rule in subject matter jurisdiction that:

> Jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit.

Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co., 174 U.S. 552, 566 (1899). The rule is the same as to amount in controversy, *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) ("[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction") and as to jurisdiction over the person, *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913) ("if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause").

Second, this Court has noted the criticisms of the "ship personification" fiction as "archaic," "an animistic survival from remote times," "irrational" and "atavistic." *Continental Grain Co. v. The FBL - 585*, 364 U.S. 19, 23 (1960) (quoting *The Carlotta*, 48 F.2d 110, 112 (2d Cir. 1931) and *G. Gilmore and C. Black, The Law of Admiralty*, 1st Ed. (1957) at 508).

Third, whatever continued validity the "ship personification" fiction may have in admiralty law, the Government's attempt to apply it, as a rationale to dismiss appeals in civil forfeiture cases, should be rejected. In *Continental Grain, supra*, this Court explained that the ship personification fiction was created to broaden jurisdiction, not narrow it:

> A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still.

364 U.S. at 23. This Court rejected the attempted extension of the ship personification fiction beyond its admiralty origins:

> We are asked here, however, to transplant this ancient saltwater admiralty fiction into the dry land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best. . . . *A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose.*

Id. at 23 (emphasis added).

The Government relied below principally on *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988), in moving to dismiss the appeal. In that case, the Eleventh Circuit, in a 6-5 *en banc* decision, held that appellate jurisdiction was lost once the Government flew the forfeited aircraft outside the territorial jurisdiction of the court. The majority opinion relied on its admiralty precedent, *Harvey* and *Taylor, supra*, to support its ruling. Judge Vance, in dissent, explained why the admiralty precedents were inapposite:

> The majority compounds the problem by misapplying an already shaky admiralty rule to the facts of this case. The jurisdictional issue in this case involves the United States, not the claimant Leybda. The plaintiff United States after initially invoking the jurisdiction of the federal courts and then removing the *res* from the district, now claims lack of subject matter jurisdiction in order to defeat claimant's attempt to appeal to this court. This is the exact opposite of what usually occurs in *in rem* cases, where the defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect.

836 F.2d at 1579 (citations omitted).

Other appellate courts have also rejected the application of this admiralty analogy to forfeiture cases. In *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 757 (1991), the Second Circuit reasoned:

> [T]he concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of these concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government.

912 F.2d at 6-7 (citations omitted). *See also United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419-20 (1st Cir. 1991) ("[t]here is no good reason why the Government should be allowed to insulate itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings").

The body of admiralty law predicated on the personification of a ship does not support, either in theory or historical purpose, the position which the Government advocates.

C. *The Government's Contention is Contrary to Basic Principles of Jurisdiction*

When a plaintiff commences a civil case and seeks the assistance of the courts to secure affirmative relief, the plaintiff submits to the court's *in personam* jurisdiction. The fact that the relief sought is "only" title to property, and not an *in personam* judgment against a defendant, relates only to the jurisdiction a court acquires over the defendant, not the plaintiff. More than fifty years ago, this Court observed, in a different context:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.

Adam v. Saenger, 303 U.S. 59, 67-68 (1938). *See Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U.S. 398, 400 (1931) ("the plaintiff being already in court qua plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence").

This has always been the rule in this Court as to appellate jurisdiction. In *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860), after the non-resident defendants prevailed in the trial court, defendants' lawyer withdrew as counsel, and the defendants were never thereafter personally served with any subsequent pleadings. As provided in the applicable state statute, the plaintiff/appellant gave notice by publication of the writ of error. 65 U.S. at 201. The appellate court proceeded to hear and determine the appeal in favor of the plaintiff/appellant. Later, the defendants challenged the jurisdiction of the appellate court, citing "[n]umerous cases . . . which assert the general rule" that notice by publication is insufficient to give a court *in personam* jurisdiction over a non-resident. This Court distinguished those cases, rejecting the proposition that one who prevails at trial may

> [v]oluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn.

65 U.S. at 203-04. This Court recognized that:

> To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court.

65 U.S. at 204. In *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932), this Court citing *Nations, supra*, reaffirmed that

> [a]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause.

Several lower federal courts have applied the same principles in civil forfeiture cases. Those courts recognize that the appellate court can never lose jurisdiction over the Government because the Government, by bringing the action, has submitted itself to the *in personam* jurisdiction of the court. In *United States v. $12,390*, 956 F.2d 801, 804 (8th Cir. 1992), the court found persuasive the line of reasoning that:

> [B]y initiating an action in federal court, the government has subjected itself to the court's in personam jurisdiction. . . . [D]espite the government's distribution of the res, the Court retains jurisdiction over the parties throughout the case.

(citations omitted). The Second Circuit also agreed that since the Government institutes civil forfeiture cases, the United States, " '[h]aving submitted itself to the jurisdiction of the court, . . .

should not be allowed to escape' appellate review of the judgment it has obtained." *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, ___ U. S. ___, 111 S.Ct. 757 (1991) (quoting *One Lear Jet*, 836 F.2d at 1579). *See also United States v. $95,945.12*, 913 F.2d 1106, 1109 (4th Cir. 1990) (agreeing with *Aiello*). Judge Edmondson expressed a similar view in his dissent in *One Lear Jet, supra:*

> The idea that, when a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case is finally concluded seems to be to be neither innovative nor unfair. I agree with Judge Vance when he says that "we have had in personam jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceeding."

836 F.2d at 1584.

Developments in the law concerning *in rem* and *in personam* jurisdiction fully support these civil forfeiture decisions. As in the case of admiralty law, *in rem* jurisdiction in non-admiralty cases was developed to broaden the availability of remedies for plaintiffs seeking to sue out-of-state defendants. *Pennoyer v. Neff*, 95 U.S. 714 (1877). The distinguishing features of *in rem* jurisdiction traditionally were seizure of property and notice by publication, and neither minimum contacts nor personal service of process were required to sustain *in rem* jurisdiction.

As the underlying rationale for *in rem* jurisdiction became less important with the increasing use of long arm statutes to confer *in personam* jurisdiction, this Court narrowed the distinction between *in rem* and *in personam* jurisdiction. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court rejected the contention that there is a substantive difference between the requirements of *in rem* and *in personam* jurisdiction:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of

> the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*, and its progeny.

433 U.S. at 212. More recently, in *Burnham v. Superior Court*, 465 U.S. 604, 620 (1990), this Court explained the "logic of *Shaffer's* holding," which

> places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact.

The other traditional feature of *in rem* jurisdiction, service by publication, has also been eroded. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court held that due process of law mandates actual notice, where possible, that service of process by publication is insufficient as to known claimants, and that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon" whether the action was labeled *in rem* or *in personam*. *Id.* at 312. The holding of *Mullane* has been applied to a wide variety of *in rem* actions: *Tulsa Professional Collections Serv. v. Pope*, 485 U.S. 478 (1988) (probate); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (eminent domain); *Schroeder v. City of New York*, 371 U.S. 208 (1962) (riparian rights); *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948 (1956) (tax assessment proceedings); *City of New York v. New York, N.H&H.R. Co.*, 344 U.S. 293 (1953) (bankruptcy proceedings).

These cases show that the same basic legal principles apply in both *in rem* and *in personam* cases. Even in admiralty cases, this Court has questioned the distinction between *in rem* and *in personam* jurisdiction. More than one hundred years ago, this Court wrote:

> To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated ....

Place v. Norwich and N.Y. Transp. Co., 118 U.S. 468, 503 (1886). Sixty years later, this Court observed: "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age." *Consumers Import Co. v. Zosenjo*, 320 U.S. 249, 253 (1943).

The Government as plaintiff comes before the court seeking to have it exercise its power to forfeit property. The Government cannot, simply by removing that property to another district, avoid the consequences of having submitted itself to the jurisdiction of the court, any more than it could by "removing" itself to another district.

D. *The Government's Contention Should Not Apply to Currency Forfeiture Cases.*

The Government's contention is particularly specious in cases involving forfeiture of money. The Government argues that appellate jurisdiction terminates when it "transfers" the money from a Government account within the territorial jurisdiction of the court to a Government account in Washington, D.C. That contention is inconsistent with settled commercial principles.

Since "[t]he relationship of bank and depositor is that of debtor and creditor," *Bank of Marin v. England*, 385 U.S. 99, 101 (1966), when money is deposited in a bank account, it becomes a debt of the bank to the depositor. *Barnhill v. Johnson*, ____ U.S. ____, 60 U.S.L.W. 4264, 4265 (March 25, 1992). When the Government, as depositor, "transfers" funds between accounts, all that has really occurred is a bookkeeping entry, not the physical delivery of cash from one bank to another, since "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

One of the consequences of the fungibility of money is that funds deposited in a bank lose their identity. When funds are deposited, title to those funds passes to the bank, and the depositor, as creditor, has the right to demand payment of the equivalent amount, but not the identical funds. *E.g., C.I.R. v. Hendrickson*, 873 F.2d 1018, 1023-24 (7th Cir. 1989); *Crocker-Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977); *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 560 (7th Cir. 1976); *United States v. Citizens and Southern Nat'l Bank*, 538 F.2d 1101, 1105 (5th Cir. 1976).

It is fanciful to argue that specific forfeited money which was deposited into an account is "transferred" out of the jurisdiction. As the Third Circuit recently explained in a civil RICO case:

> Legally as well as economically, money is fungible — if the debtor with $100,000 cash in its general coffers owes $10,000 to someone, there is no meaningful distinction among which of those dollars is actually paid to satisfy the debt.

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 195-96 (3d Cir. 1990). *See also United States v. Fidelity Philadelphia Trust Co.*, 459 F.2d 771, 776 (3d Cir. 1972) ("the reality is that most banking transactions are by check and, insofar as the bank is concerned, 'possession' of depositor's funds is merely a computer entry on a bookkeeping ledger").

It is for this reason that several courts of appeal have held that in currency forfeiture cases, the Government may not divest a court of jurisdiction by "transferring" the forfeited funds, since, in reality, the forfeited funds have not been transferred. In *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417 (1st Cir. 1991), the court rejected the argument that the Government can defeat appellate jurisdiction by moving money from one Government bank account to another:

> Jurisdiction based on the location of the *res* is particularly inapposite to a currency forfeiture case. The government has possession and control of the currency from the time it

> seizes it. The execution of the judgment merely transfers it from one government pocket to the other. Basing jurisdiction on what pocket contains the currency is nothing more than a shell game.

Id. at 1420.

In *United States v. $1,322,242.58*, 938 F.2d 433 (3d Cir. 1991), the Third Circuit agreed:

> [W]e do not think that rules concerning physical location can be applied in any meaningful sense to an incorporeal *res* such as that involved in this case. The *res* at issue here is merely an entry in a Justice Department account with the United States Treasury. In other words, the *res* is an obligation on the part of the Treasury to disburse the specified sum to the Department of Justice. Deeming this obligation to be located at any particular place within the United States would be a complete fiction. If we are compelled, however, to determine where this obligation is "located," we cannot say that the obligation does not exist in every part of the country, including the District of Delaware.

Id. at 437-38.

E. *The Government's Contention is Contrary to 21 U.S.C. § 881(j).*

In this case, 21 U.S.C. § 881(j) provides an additional basis for jurisdiction, without regard to the location of the property. By statute, the United States District Courts have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States...." 28 U.S.C. § 1345. Additionally, the United States District Courts have exclusive jurisdiction "of any action or proceeding for the recovery or enforcement of any ... forfeiture ... incurred under any Act of Congress." 28 U.S.C. § 1355. Appellate jurisdiction vests in the United States Courts of Appeals "from all final decisions of the district courts of the United States ...." 28 U.S.C. § 1291.

A special venue statute, 28 U.S.C. § 1395(b), applies in civil forfeiture cases: "a civil proceeding for the forfeiture of property may be prosecuted in any district were such property is found."

In 1984, Congress enacted 21 U.S.C. § 881(j) which provides:

> In addition to the venue provided for in Section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

The United States instituted this forfeiture action under 21 U.S.C. § 881(a)(6). (JA 26). The United States "found" the owner of the property, Indalecio Iglesias, in the Southern District of Florida and personally served him with process. (JA 26). At that point, pursuant to § 881(j), the district court's jurisdiction was complete without regard to the location of the property. Since the property was also located in the Southern District of Florida, there was a second basis for jurisdiction under § 881(j). Moreover, during the pendency of the action, the Grand Jury sitting in the Southern District of Florida indicted Iglesias in that district, charging him with criminal violations pertaining to the subject property. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433, 1434 (11th Cir. 1991). (JA 30-31). At that point, under § 881(j), there were three bases for jurisdiction.

Thereafter, the district court entered its final judgment and Republic took an appeal. The Government then purported to "transfer" the money to its Asset Forfeiture Account outside of the Southern District of Florida and moved to dismiss the appeal.

Republic opposed the motion to dismiss on the grounds that the other two bases for jurisdiction specified in § 881(j) were

present, regardless of the location of the property. The Eleventh Circuit, in dismissing the appeal, ruled that:

> By its clear terms Section 881(j) simply affords the government a choice of venue as to where to bring a forfeiture action. It may chose to prosecute the forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found. This choice does not extend to claimants. Here the *res*, which was alleged to be owned by Iglesias, was forfeited in the Southern District of Florida. Republic filed its claim in the same district. The fact that Iglesias was indicted in the same district after the institution of the forfeiture proceeding is of no moment. Nor does the fact that Iglesias was found in the Southern District of Florida give continuing jurisdiction after the *res* has been removed. He never filed a claim and was never a party to the lawsuit. Finding Iglesias in the district was not necessary to effect the *in rem* forfeiture.

932 F.2d at 1435. (JA 32).[2] The Eleventh Circuit found § 881(j) was "irrelevant to this action" and that "[t]he only basis for jurisdiction in this case is that the defendant property was located and arrested in this district." 932 F.2d at 1435. (JA 33).

The Eleventh Circuit misconstrued the significance of § 881(j). Under that statute, the Government has the initial choice of where to bring this action, and § 881(j) broadens that choice. The Government selected the Southern District of Florida, but in making that choice, the Government did not announce that it was making its selection "only" because the property was located there, or "only" because the owner was found there, or "only" because the owner would be indicted there. In fact, the Southern District of Florida was an appropriate place in which to bring this action for all three reasons. Only one basis for jurisdic-

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[2] The Eleventh Circuit's statement that Iglesias "never filed a claim" is incorrect. Thule Corporation filed a claim as owner of the property. (JA 6). The district court found that "Thule was the straw owner for Iglesias." (JA 10).

tion is necessary. The fact that after the judgment, the Government "transferred" the property out of the Southern District of Florida *arguendo* eliminated one basis for jurisdiction to hear Republic's appeal. However, there remained two other bases for jurisdiction, and the appeal should not have been dismissed.

F. *The Government's Contention is Unfair and Unjust.*

There is no compelling legal support for the Government's contention. Moreover, adoption of the Government's position would lead to several undesirable consequences.

1. *Parties who cannot afford a bond will lose their right to appeal.*

The Government's position effectively limits the right to appeal forfeiture judgments to wealthy claimants. Supersedeas bonds are expensive. Bonding companies charge substantial premiums to issue bonds and typically require collateral to secure them. Requiring claimants to obtain a stay in order to appeal will result in cases in which parties will lose the right to appeal because they are unable to post a supersedeas bond.

Under Fed.R.Civ.P. 62(d), a supersedeas bond is a prerequisite for a stay.[3] In *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988), the *res* was a multimillion dollar aircraft. According to Judge Vance's dissenting opinion, "[t]he claimant-appellant was unable

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[3] There is some authority that a district court may enter a stay order without the necessity of a bond:

> in unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery.

Federal Prescription Serv., Inc. v. Am. Pharm. Ass'n, 636 F.2d 755, 760-61 (C.A.D.C. 1980). There are, however, contrary cases. Id. at 757 n. 3 (collecting authorities). While there are some courts which might grant a stay for an already impecunious party, there are apparently no courts which will dispense with a bond where posting a bond would render the party insolvent. *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986).

to supersede the forfeiture judgment because it lacked the funds to do so." 836 F.2d at 1577-78. As a consequence, the Government removed the plane to Missouri, and the Eleventh Circuit dismissed the appeal on the Government's motion. In dissent, Judge Vance emphasized the unfairness of this result:

> Federal law and rules of procedure provide that a judgment may be appealed without any supersedeas bond. Here, however, the claimant is being deprived of that important right because of its impecunious state.
>
> To my mind the egregiousness of the result is magnified because this is a forfeiture case — a penal proceeding wherein strict construction of authorizing statutes have been required almost as long as construction itself. . . . Forfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause. For this court to eliminate the right of appeal, the most important safeguard against abuse, is indeed a drastic step.

836 F.2d at 1578 (citation omitted).

Appeals of forfeiture judgments should be available to all parties regardless of their financial resources.

2. *Parties who can afford a bond must act almost as soon as the judgment is entered or lose their right to appeal.*

If, as the Government argues, a stay is necessary in order to appeal, parties who can afford to appeal will no longer have thirty days from the final judgment to decide whether to appeal as specified in Fed.R.App.P. 4(a). Rather, such parties will have to obtain a stay by the tenth day after entry of judgment, or the ability to appeal will be lost.

It is unrealistic to assume that district courts will routinely enter a stay in the ten days between entry of the final judgment and the expiration of the automatic stay provided in Fed.R.Civ.P. 62(a). For example, in *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), more

than ten days elapsed after entry of judgment, and the district court ordered disbursement of the funds from the court registry. The court denied an emergency motion to prevent disbursement pending an appeal. The funds were disbursed, and the Eleventh Circuit dismissed the appeal for lack of jurisdiction.

It is also unfair and unwise to require a losing litigant objectively to decide whether an appeal is warranted in such a short time. Time is often needed to review the final judgment, analyze the record and reflect on the case before deciding whether to appeal. *See, e.g.*, Fed.R.App.P. 4(a)(5) (providing for additional time beyond 30 days to file a notice of appeal). The Government's proposed rule, which unnecessarily shortens the time to take an appeal, should not be adopted.

3. *In order to extend the ten day automatic stay, emergency motions for stay relief must be both filed and granted by already overburdened federal courts.*

Even if one were to assume that a district court, or an appellate court, on an emergency basis, will grant a stay within ten days of the entry of a final judgment, a rule which requires a stay in every civil forfeiture case will substantially and unnecessarily add to the work of already overburdened federal trial and appellate courts. Civil forfeiture actions are a major weapon of the United States in its war on drugs. From 1985 to 1990,[4] the Government confiscated money and goods worth approximately $1.5 billion, with the fate of another $1.3 billion still undecided. *United States v. $12,390.00*, 956 F. 2d 801, 807 n.6 (8th Cir. 1992) (Beam, J. dissenting in part). In 1990, the government expected to forfeit property worth $700 million. The total value of forfeited cash and property represents a growth in asset forfeitures of over 1,500 percent since 1985. *Id.* In 1990, of the 31,763 federal civil cases commenced by the Government, 6,019, or approximately 20%, were forfeiture or penalty cases. Table C2, Administrative Offices of the U.S. Courts, Analysis and Reports Board, Statistics Division. With this avalanche of cases, the

[4] 1990 is the last year in which statistics are available.

burden of ruling on stay motions, emergency appeals from those rulings, and rulings on motions to dismiss appeals, will grow exponentially.

4. *The Government does not need the protection of a bond.*

Requiring a claimant to post a bond to appeal a civil forfeiture judgment is anathema to the rationale underlying the supersedeas bond concept. In admiralty cases, the bond requirement protects the prevailing party by assuring that, pending appeal, the ship will not "stealthily abscond from port." *United States v. $95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990). By contrast, in civil forfeiture cases,

> the defendant *res* is in the possession of the United States and thus in no danger of disappearing.... Having prevailed below, the government, if it wins on appeal, is assured of execution regardless of whether [the claimant] files a bond or stays execution of the judgment.

Id. (brackets added).

The Government does not need the protection of a bond in a civil forfeiture case. What the Government seeks, by proposing the "no *res* no jurisdiction" rule, *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991), is to destroy the appellate rights of parties. The bond concept should not be made into a weapon to defeat the remedial purpose for which it was originally established.

CONCLUSION

This Court should vacate the judgment below, and order the appellate court below to reinstate Republic's appeal.

Respectfully submitted,

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April 23, 1992